Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC	)	
Separate Affiliate and Related	)	WC Docket No. 02-112
Requirements	)	
	)	
2000 Biennial Regulatory Review	)	
Separate Affiliate Requirements of Section	)	CC Docket No. 00-175
64.1903 of the Commission's Rules	)	
	)	

COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTA),[1] through the undersigned and pursuant to Federal Communications Commission (FCC or Commission) Rules 1.415 and 1.419,[2] hereby submits its comments in response to the *Further Notice*[3] in the above-docketed proceedings. The Commission seeks comment regarding the appropriate regulatory classification – dominant or non-dominant – of Bell Operating Companies (BOCs) that offer in-region, interstate or international interexchange telecommunications services after the sunset of the Commission's Section 272 separate affiliate requirements and of independent incumbent local exchange carriers

[1] USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

[2] 47 C.F.R. §§ 1.415 and 1.419.

[3] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements* and *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, WC Docket No. 02-112 and CC Docket No. 00-175, FCC 03-111, Further Notice of Proposed Rulemaking (rel. May 19, 2002) (*Further Notice*).

(Independent ILECs) if the Commission eliminates the separate affiliate requirements imposed on certain Independent ILECs when they provide in-region, interstate or international interexchange telecommunications services.[4] As discussed below, the appropriate regulatory classification for all ILEC interstate, interexchange and international services originating from within an ILEC's incumbent local exchange services area, whether provided through a separate affiliate or through an integrated structure, is nondominant. The material and irrevocable existence of competition in the exchange access and interexchange market requires this conclusion.

DISCUSSION

I. The Commission Should Not Classify BOCs or Independent ILECs as Dominant or Impose Alternative Regulatory Requirements If and When They Provide In-Region, Interstate or International Interexchange Telecommunications Services Outside of a Separate Affiliate.

The Commission has initiated this proceeding seeking an enormous amount of information on the product/service markets and geographic markets of BOCs and Independent ILECs in order to ascertain whether they could exercise market power, which the Commission presumes they have in the local and exchange access markets, to unilaterally raise and sustain prices for their in-region, interstate and international interexchange telecommunications services above competitive levels in a particular relevant geographic market. Based on the analysis of the information it may receive, the Commission intends to decide whether BOCs and Independent ILECs should continue to be subject to dominant carrier regulation or whether some alternative regulatory requirements should be imposed for these services. Yet, the fact that the Commission has requested such detailed information signifies that the Commission has failed to take notice of its own findings concerning the status of the competitive market for local, exchange access, and

[4] *See Further Notice*, para. 2.

long distance services. In fact, it is absurd to think that BOCs or Independent ILECs have any ability in today's competitive telecommunications market to leverage an advantage in the long distance market, which would justify imposition of dominant carrier regulation or some alternative regulatory requirements on them. Today, more than 140 million customers have the ability to wholly bypass ILEC networks to place local as well as intrastate and interstate, interexchange and international calls. Add to that the steady increase in wireline telecommunications alternatives offered by competitive local exchange carriers (CLECs) and the emergence of IP telephony services available from cable companies and others, and it becomes apparent the ILECs have no market power in their local exchange, exchange access, or interexchange service markets.

With regard to Independent ILECs, prior to 1997 they provided local and long distance services on an integrated basis without any concern by the Commission regarding the ability of Independent ILECs to exercise market power in the long distance market. It was only in 1997 that the Commission adopted a rule requiring separate affiliates and separate corporate divisions for Independent ILECs that provided long distance services. There was no material evidence of harm justifying the imposition of the separate affiliate or separate corporate division requirements then and none exists now.

The Commission should declare that Independent ILECs are no longer required to use a separate affiliate or a separate corporate division when providing any in-region, interstate and international interexchange services, affirm that their interexchange services are nondominant, and affirm that they are free of any regulatory restrictions that do not apply to other carriers, including the separate subsidiary requirement.[5] Further, those BOCs operating in states where

[5] The Commission has been considering the regulatory classification of Independent LECs for almost two years. It is time to put this matter to rest by recognizing that there is not, and never

their Section 272 requirements have sunset should be classified as non-dominant in their provision of in-region, interstate and international interexchange services and be freed of any regulatory restrictions that do not apply to other carriers, including the separate subsidiary requirement.

II. BOCs and Independent ILECs Do Not Have Market Power in the Local and Exchange Access Markets That Can Be Leveraged to Gain an Advantage in the Long Distance Market.

There can be no doubt that the long distance market is fully competitive and that BOCs and Independent ILECs are not dominant in that market. In fact, the Commission has already determined that BOCs and Independent ILECs through their separate affiliates do not have market power in the long distance market by classifying them as non-dominant.[6] In addition to this finding, there is ample evidence that the long distance market is fully competitive. The most telling evidence is that there are more than 700 companies offering long distance services.[7] Moreover, the Commission has indicated in its Telephone Trends Report that the number of long distance companies appears to be growing, which indicates competition in the long distance

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was, any need to require Independent LECs to provide long distance services through a separate affiliate or separate corporate division. *See generally2000 Biennial Review; Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175, Notice of Proposed Rulemaking (rel. Sept. 14, 2001).

[6] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149 and 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61 at paras. 6 and 7 (rel. Apr. 18, 1997) (*LEC Classification Order*).

[7] *See* "Trends in Telephone Service," Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau, May 2002 at 10-1 (Telephone Trends Report). The data supporting the Commission's statement that more than 700 carriers are providing long distance services is year 2000 data. More recent data may indicate that the number of companies providing long distance services now exceeds 900. *See id*. at 10-10.

market is expanding, not contracting.[8] Equally important, the providers of long distance services are diversifying beyond the traditional wireline interexchange carrier provider. Now long distance services are being provided by wireless carriers, cable telephony providers, and broadband service providers. The share of the long distance market held by companies offering those services is also indicative of the fact that BOCs that have obtained authorization to provide interLATA service do not have market power in the long distance market. For 2001, the Commission's data shows that AT&T had a market share of 38%, MCI's share was 24%, Sprint's share was 9%, and more than 1,000 other long distance companies had a combined share of almost 24% of the remaining market. The BOC's long distance affiliates had a combined share of only just over 6%.[9] With regard to Independent ILECs, they have not in the past, and do not now, have market power in the long distance market. In previous comments filed by USTA in the 2000 Biennial Regulatory Review docket, USTA noted that a survey of Independent ILECs indicated that at least 65% of them provided interexchange service on a pure resale basis, which clearly does not allow for the exercise of market power on the part of Independent ILECs in the long distance market.[10] Even where Independent ILECs use their own facilities, their ability to advantage their interexchange operations are constrained by the wide availability of wireless alternatives in the rural and nonrural markets that they serve.

Second, and more importantly with regard to this proceeding, there is no reason to believe that BOCs or Independent ILECs have the ability to advantage themselves in the long

[8] *See id*. at 10-10.

[9] *See* "FCC Releases Statistics of the Long Distance Telecommunications Industry Report," FCC News (rel. May 14, 2003).

[10] *2000 Biennial Regulatory Review; Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, Comments of the United States Telecom Association, CC Docket No. 00-175 (Nov. 1, 2001) at 4.

distance market based on the Commission's presumption of their market power in the local exchange and exchange access markets. The fundamental question the Commission must answer in determining whether BOCs and Independent ILECs can advantage themselves in the long distance market is whether BOCs and Independent ILECs have market power with respect to essential inputs for their interexchange competitors. This question can be quickly answered in the negative by simply acknowledging the status of the competitive telecommunications market and the ease with which customers can and do bypass ILEC facilities and services for interexchange telecommunications.

The growth of wireless service[11] is significant. Wireless carriers are offering one-rate packages for unlimited local and national long distance services.[12] In effect, consumers can make all of their local and long distance calls over a wireless phone for a set, low monthly fee. National wireless calling plans have effectively obliterated the distinction between local and long distance calls for customers. Increasingly, customers are substituting wireless service for their wireline local and long distance services. The decline of interexchange and access minutes by

[11] The Commission has adopted its annual report on the state of competition in the wireless industry, in which it notes that the "number of mobile telephone subscribers rose from 128.5 million to 141.8 million, resulting in a nationwide penetration rate of roughly 49 percent." "FCC Adopts Annual Report on State of Competition in the Wireless Industry," FCC News (rel. June 26, 2003). In that report, the Commission also stated that "270 million people, or 95 percent of the total U.S. population, live in counties with three or more different mobile telephone operators, and more than 236 million people, or 83 percent of the U.S. population, live in counties with five or more operators competing to offer service." *Id*. Not only do consumers have access to wireless services, but they are using these services more and more. The Commission also notes that "minutes-of-use per month averaged 427 between June and December 2002, an increase of 12 percent from 380 during the same period in 2001." *Id*.

[12] The Commission notes in its *Seventh Annual Report on Mobile Services* that "today all of the nationwide operators offer a . . . [Digital One Rate] DOR pricing plan that allows customers to purchase a bucket of MOUs on a nationwide network without incurring roaming or long distance charges." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial* Services, Seventh Report at 29 (rel. July 3, 2002) (*Seventh Annual Report on Mobile Services*).

ILECs (BOCs and Independent ILECs) is a fact.[13] Wireless carriers could see increased growth in customer use of their service – local and long distance – when intermodal local number portability takes effect on November 24, 2003. A recent study focusing on wireless number portability indicates that about 9 million survey respondents would likely "port their home wireline number to a wireless carrier once wireline-to-wireless number portability takes effect."[14]

Similar to the growth of wireless services, CLECs are also experiencing growth in their provision of local and exchange access services, particularly through service plans such as WorldCom's The Neighborhood. As reported by the Commission on June 12, 2003, CLEC end user lines increased by 26%.[15] At the end of 2002, CLEC access lines totaled 24.8 million.[16]

Further significant competition to the local and exchange access services of the BOCs and Independent ILECs has come from cable telephony providers and other companies offering inexpensive, unlimited local and long distance voice services via Internet Protocol-based platforms. Customers can secure local and long distance voice service from their cable company or from other companies that will offer voice service over a customer's broadband connection (whether DSL or cable modem). Analysts predict that companies like Vonage, a provider of

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[13] Referring to the substitution of wireless services for wireline services, the Commission notes in its *Seventh Annual Report on Mobile Services* that the "number of residential access lines served by BellSouth, SBC, and Verizon dropped by almost 3 percent during 2001, more than 2.5 million lines." *Id*. at 32 (*citing* Linda J. Mutchler *et al*., *The Next Generation VI: Wireless in the US*, United States Telecom Services – Wireless/Cellular, Merrill Lynch, Mar. 8, 2002 at 85.) The Commission also cites loss of wireline long distance to use of wireless services, noting, for example, an analyst claim "that 20 percent of AT&T's customers, or 5 million people, have replaced some wireline long distance usage with wireless." *Id*. at 33 (*citing Carriers Said to Need New Tactics to Combat LD Substitution*, COMMUNICATIONS DAILY, Mar. 15, 2002 (citing Yankee Group analyst Knox Bricken).)

[14] Glenn Bischoff, *Study: Number portability will trigger huge migration*, Primedia Business Magazines & Media, Inc. (June 19, 2003).

[15] *See* Federal Communications Commission Releases Data on Local Telephone Competition, FCC News (rel. June 12, 2003).

such IP-based bundled voice will take substantial numbers of voice customers from BOCs in the next year or two.[17] Cablevision Systems Corp. has announced plans to deploy an all-IP-voice service, which will provide unlimited local, regional, and long distance calling as well as numerous features, by the third quarter of this year for a low flat rate.[18]

The competition from wireless carriers, CLECs, cable providers, and other companies providing services over the Internet[19] eliminates the ability of BOCs or Independent ILECs to exercise market power in the local and exchange access markets. By virtue of their inability to exercise market power with respect to the provision of exchange access, it is impossible for BOCs or Independent ILECs to "leverage" an advantage for their interstate, interexchange and international services. BOCs and Independent ILECs do not even provide inputs for many carriers that now compete with them. Where they do provide an input (exchange access), neither BOCs nor Independent ILECs have the ability to leverage provision of the input to the advantage of their own or affiliate interstate, interexchange or international services. No justification exists to continue imposing a separate affiliate or a separate corporate division requirement for these interstate, interexchange and international services. Nor is there a justification to treat these services when provided by BOCs or Independent ILECs as dominant carrier services.

CONCLUSION

The long distance market is fully competitive. More importantly, consumers have numerous alternatives for reaching long distance services providers, which prevents BOCs and Independent ILECs from leveraging an advantage in the long distance market. All of this is

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[16] *See id*.

[17] *See* Leslie Walker, *Calling on the Internet*, The Washington Post (June 19, 2003).

[18] *See* Karen Brown, *Cablevision Running with VoIP*, Multichannel News (June 30, 2003).

reflected in the current state of the telecommunications market and accordingly it is not necessary for the Commission to proceed with an intensive data collection and analysis to make these determinations. The Commission's own competition reports provide the justification for regulatory relief. As stated previously, the Commission should declare that Independent ILECs are no longer required to use a separate affiliate or a separate corporate division when providing any in-region, interstate and international interexchange services and that Independent ILECs and those BOCs operating in states where their Section 272 requirements have sunset are classified as non-dominant in their provision of in-region, interstate and international interexchange services and free of any regulatory restrictions that do not apply to other carriers.

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[19] Interestingly, all of these competitors seem to compete best by offering their services on a bundled basis.